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Juries, Lay Judges, and Trials

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Overview

“Juries, Lay Judges, and Trials” describes the widespread practice of including ordinary citizens as legal decision makers in the criminal trial. In some countries, lay persons serve as jurors and determine the guilt and occasionally the punishment of the accused. In others, citizens decide cases together with professional judges in mixed decision-making bodies. What is more, a number of countries have introduced or reintroduced systems employing juries or lay judges, often as part of comprehensive reform in emerging democracies. Becoming familiar with the job of the juror or lay citizen in a criminal trial is thus essential for understanding contemporary criminal justice systems in many countries. This article reviews procedures for selecting jurors and lay judges and outlines lay participation in fact finding and in sentencing phases of the criminal trial. It also assesses the promises and challenges of lay participation in law. Reviewing and evaluating the effects of the different approaches that countries have taken to incorporating lay citizens, it reflects on whether the goals of democratic deliberation are being met in both jury and lay judge systems. It concludes with suggestions for future directions for research.

1. Doing the Job of Democracy

The custom of employing ordinary citizens as legal decision makers in criminal trials is wide-spread. Originating in early legal systems, this practice has continued in modern times as a vehicle for including a democratic element in law. In approximately 50 countries, ranging from Australia to Kazakhstan to Spain and Sri Lanka, citizens serve as jurors, deciding cases in independent bodies separate from professional judges. In many other countries, such as Italy, Poland, and Japan, citizens participate as lay judges (alternately called lay assessors), deciding cases together with professional judges in mixed decision-making bodies. Whether citizens serve as jurors or lay judges often depends on whether the legal system derives from a common or a civil law tradition. Juries are more likely to act as independent decision makers in common law adversarial trials, whereas lay judges appear more often in civil law inquisitorial trials and tribunals (Thaman 2011).

Delegating the task of adjudicating a criminal trial to ordinary citizens promotes democracy in both legal and political institutions. Laypersons bring the voice of the people to the law. They draw on their own life experiences, allowing trial decisions to more accurately reflect the society that the legal system serves. This is a form of representative democracy in legal institutions (Malsch 2009). When the trial is finished, lay citizens return to the community, sharing the lessons they learned about the law, ensuring an accountable and transparent legal system.

Employing juries and lay judges supports and enhances democratic political institutions. Lay-persons act as a check on authority. They balance the power imbued in state officials such as prosecutors or professional judges. And by contributing to

decisions that directly affect the people, juries and lay judges engage in an act of self-governance, reestablishing the people's sovereignty. This act of self-governance in the legal realm affects political participation. As individuals perform the duties of a juror or lay judge, they become more connected to the world around them. The French political thinker Alexis de Tocqueville believed that jurors internalized the duties they owed to society and the role they ought to play in government. Writing in admiration of the US jury system, he observed that the jury communicates "the spirit of the judges to the minds of all the citizens" and that "this spirit, with the habits which attend it, is the soundest preparation for free institutions" (Tocqueville 87 1835/1945, p. 289).

Jurors and lay judges also act as conflict resolvers. They attend to the conflict between the state (as representative of the victim and the community) and the defendant by reaching a verdict in cases that may feature difficult and often complex competing narratives. And, depending on the jurisdiction or type of crime, lay judges and juries may participate in punishment decisions for convicted defendants.

Despite the important role that they play in the criminal trial, juries and lay judges face challenges on several fronts. First, critics argue that the evidence and legal arguments now being introduced in contemporary trials are too complex for untrained eyes. These critics question the lay participant's ability to understand new technologies and scientific methods such as DNA or mtDNA and accuse juries in particular of relying on expert credentials rather than evaluating the substance of expert testimony. A broad trend toward professionalization in the nineteenth and twentieth centuries deepened a mistrust of lay participation in the law and other expert domains. Professionals were thought to be superior to ordinary citizens because of their theoretically rich education, instruction in the practical skills of decision making, and greater adherence to rational scientific principles. Now, in a contemporary twist, modern technology invites new concerns about the soundness of lay decision making, with some worrying about jurors' use of cell phones or Internet to obtain information about cases and parties that would otherwise not be available in the courtroom proceedings (Waters and Hannaford-Agor, in press).

Moving from courtroom proceedings to post-trial coverage, a second concern about lay participation is evident in the way the public scrutinizes criminal trial verdicts. Media and members of the public often disparage jury decision making following controversial judgments, especially in cases where a notorious defendant is found not guilty. The popular press in the United States conveyed public outrage following verdicts of not guilty for O.J. Simpson and Casey B. Anthony, trials that were decades apart. Similarly, support for Spain's recently introduced jury system dropped precipitously following a jury's acquittal of a defendant who was on trial for killing two police officers (Hans 2008).

Remarkably, one of the greatest challenges to lay participation in legal decision making is the sharp decline in criminal trials. Despite a constitutional right to trial by

jury, in the United States, plea bargaining and other settlements resolve almost all criminal cases. As a result, the number of jury trials has declined in both state and federal courts. Today, US juries decide just 5–10% of all criminal cases. In the United Kingdom, the number is even lower, at 1% of cases. In a surprising contrast, a number of countries outside the United States and the United Kingdom have recently introduced new lay participation systems, often as part of broad efforts to support emerging democratic systems (Hans 2008; Kovalev 2010; Marder 2011).

Historically, European countries transplanted all or part of their legal systems to their colonies. Thus, juries were found in legal systems in the United States and in British colonies in Africa, parts of India, Australia, New Zealand, and some Caribbean and South American countries (Hans 2008; Vidmar 2000). Several countries dismantled the institution post independence, particularly where native populations saw jury verdicts as furthering the interests of colonizers or where the right to a jury trial was not extended to indigenous peoples. But now, citizen participation is seeing a rebirth, particularly in countries that are democratizing following periods of authoritarian rule (Lempert 2007). Notable examples include Spain, which began conducting jury trials in the mid-1990s, as well as Russia (Thaman 2011). In fact several post-Soviet countries, including Armenia, Kazakhstan, Ukraine, and Azerbaijan, enshrined a right to trial by jury in their constitutions (Kovalev 2010). The newly independent country of Georgia modeled its jury system on US juries and held its first criminal jury trial in the fall of 2011. In the last decade, East Asian countries enacted court reforms which created new and innovative methods of lay participation: Japan adopted a mixed court with lay judges, whereas South Korea introduced a jury system. Other countries, while not adopting the independent jury model, have altered their trial processes away from dossier-based inquisitorial approaches toward more adversarial oral evidence presentation to facilitate eventual citizen participation.

Becoming familiar with the job expected of jury and lay citizens is therefore essential for understanding contemporary criminal justice systems in many countries. This entry first describes the independent fact finding of jury systems and then turns to a consideration of mixed courts of lay and professional judges. It summarizes research evidence about how well lay decision makers function and reflects on whether the goals of democratic deliberation are being met. The entry concludes by considering contemporary challenges and future directions for research.

2. Juries at Trial

The trial by a jury of one's peers dates back to thirteenth-century England. These early juries were composed of land-owning white men, who testified about their personal knowledge of local disputes. Over time the institution changed so that jurors functioned less like witnesses and more like fact finders. In England, distinct roles for judge and jury developed in the 1700s. A similar evolution took place in the United States toward the

end of the nineteenth century (Vidmar and Hans 2007). Formally, the judge determines the law and the jury applies that law to the facts as it finds them. However, in practice, the distinction between applying the law and finding facts is not always so clear.

A sketch of the jury trial reveals a handful of basic steps, starting with selecting individuals from a pool of persons summoned to serve on the jury (National Center for State Courts Jury Topic Page). Once the trial is underway, the jury listens to the evidence presented and will alone make the decision about whether there is enough evidence to support a finding of guilt. If the defendant is found guilty, in some jurisdictions and some types of trials, the jury may be involved in sentencing the defendant.

Jury Selection

A large government-funded organization is seeking 12 thoughtful people for group decision-making. Applicants must be willing to put their regular lives on hold for a year or more in return for low pay and zero benefits. Out-of-pocket expenses will not be covered (Butler 2007 p. B1).

This imaginary job advertisement for jury duty captures the challenges that confront judges and other tenured members of the court in their search for citizens to serve as jurors, particularly in lengthy trials. Selecting members of the jury, however, may be the most important stage of the trial because the jury's ability to inject a democratic perspective into the legal system depends on its composition. A jury drawn from a representative cross-section of the population is in a better position to express the full range of the community's views. Yet, for much of its history, juries have reflected the more privileged and elite segments of their communities. Men, whites, and those with more education, higher occupational status, and higher incomes were overrepresented on juries compared to their numbers in the population.

In the last several decades, jury commissioners have taken advantage of technological advances to reform the summoning process in order to achieve more representative groups of prospective jurors. Commissioners combine lists of potentially eligible residents and send out summonses for jury duty to residents living in geographically diverse areas. Some jurisdictions even use targeted replacement mailings to ensure representation from parts of the community that tend to have lower return rates. Governments have raised the compensation for jury service, especially for long trials when jurors may be away from their employment for a substantial period of time. While in many countries these methods still fall short of producing fully representative groups, they are a decided improvement over the past when jurors served based on personal recommendations or were handpicked by jury commissioners.

The process of summoning a large group of eligible jurors begins the trial. While the specifics vary across jurisdictions, typically both the judge and the attorneys are able to remove individuals before finalizing the jury that will ultimately decide the case. In the

United States, the judge has the ability to decide “for cause” challenges to eliminate clearly biased jurors, whereas attorneys have a limited number of “peremptory” challenges that they may exercise without providing reasons. Other countries such as England and Wales do not permit peremptory challenges. The Korean system allows each side five peremptory challenges and an unlimited number of challenges for cause (Park 2010). In Canada, subgroups of jurors determine whether other jurors are impartial or should be removed for cause.

Providing a mechanism for removing apparently biased individuals from the jury helps to ensure the integrity and quality of the jury’s decision. Nevertheless, opponents criticize the jury selection process, with some pointing to evidence that race and other impermissible factors infect it, and others doubting the ability of judges and lawyers to identify and remove biased jurors. In the United States, a robust field of jury consulting has developed to assist lawyers in selecting jurors; it is employed predominantly in high-profile criminal trials and with wealthy defendants (Tanovich et al. 1997; Vidmar and Hans 2007).

Juries as Fact Finders

During the trial, the jury acts as a fact finder, working through witness testimony, exhibits and the lawyers’ arguments in order to uncover the facts of the case. Researchers interested in how juries process truncated and conflicting sketches of events use several theories to explain the jury’s fact finding role. The most common theory is the “story model,” in which jurors arrange the evidence into a narrative account. Other theoretical explanations focus on the psychological processes of anchoring and adjustment. Jurors anchor on their initial perception but adjust their opinion about the probability of the event having occurred as new evidence is presented at trial. A final theory is that jurors integrate information by weighing relevant information and combining discrete pieces of evidence. Ideally, jurors would evaluate the strength and weakness of evidence using relevant and impartial criteria. However, research indicates that factors unrelated to the strength of the evidence influence some juries. In the aggregate, jurors are more likely to attribute accuracy to eyewitness identification when a witness displays confidence, even though this is not an indication of reliability. As well, juries tend to give more weight to identifications made by police officers.

At its best, jury decision making embraces many of the features of deliberative democracy. Members of the jury hold a diverse set of viewpoints which can be brought forward and evaluated through reason-based discussion. Open discussion helps ensure that trial evidence is thoroughly evaluated, that rival explanations are examined, and that mistaken recollections are corrected. Through this process of deliberation and discussion, the jury reaches binding conclusions on the defendant’s guilt or innocence. Empirical studies on group decision making confirm some but not all of the predictions of deliberative democracy theory. Studies show that groups outperform individuals in

recalling facts, in correcting errors, and in pooling information. However, studies also show that during the deliberative process, once jurors are made aware of the majority view, they will tend to move in that direction, regardless of whether the view is to convict or acquit. Other studies indicate a leniency bias, where jurors in a numerical minority arguing for acquittal have more impact than a minority arguing for conviction. Either way, as the majority increases, so does the pressure on the minority to conform to the majority view.

Several studies reveal that judges and juries agree on the verdict in a substantial majority of cases, and that when judges and juries disagree, it is for reasons other than the difficulty of the evidence. A recent study of the first 3 years since the introduction of jury trials in South Korea confirms these findings (Kim et al. 2013). While in most cases judges and juries agree on the verdict – 91.4% of the time in South Korea – when they do disagree, juries tend to be more lenient than judges, perhaps because they have a more generous interpretation of reasonable doubt, because they sympathize with the defendant, or because they disagree with the law. Judges' professional training and prior experience deciding criminal cases are also factors. The sizeable overlap between professional judges and juries should assuage concerns about jury incompetence. On the other hand, the research lends some support to beliefs that juries are more generous to criminal defendants than judges sitting alone.

Jury's instantiate civic duty and their work strengthen legal and political institutions. Jurors report higher regard for the institution following their trial experiences (Diamond 1993). In a national survey of over 8,000 former jurors in the United States, 63% reported that they were more favorable about jury duty after serving. Other studies similarly show enhanced regard for the courts and for judges after jury service. Surveys of jurors in South Korea's new advisory jury system show positive views of the experience (Park 2010).

Moreover, there may be a direct link between jury decision making and interest in politics (The Jury and Democracy Project website). A multidisciplinary team conducted research on the salutary effects of jury service on civic participation (Gastil et al. 2010). An initial study of Thurston County, Washington, residents found that jurors who took part in deciding the verdict at trial voted more frequently in subsequent elections than people who were called for jury duty but were dismissed, were alternates, or were on hung juries that could not reach a verdict. A follow-up study conducted nationwide included a sample of more than 13,000 jurors. This latter study found that jurors who had been infrequent voters were more likely to vote after serving jury duty. In this case, it didn't matter whether the jury had reached a verdict or not.

The job of serving as a juror in a criminal trial does, however, come with a cost. Jurors experience stress, especially following lengthy trials or in trials where the offense and potential punishment is severe (Anand and Manweiler 2005). In a 1998 study, jurors identified several sources of stress, including deciding on the verdict, jury deliberations,

disruption to daily routine and dealing with lurid evidence (National Center for State Courts, 1998). A 2001 Canadian study revealed similar sources of stress, including reaching a verdict and the deliberation process. Canadian juries present a particular challenge for researchers, as they are prohibited by law from disclosing any information about jury proceedings. The closed nature of jury proceedings in Canada acts as an additional source of stress for these jurors, who are not able to process potentially emotional or difficult information with others (Chopra 2002). The responsibility placed on juries is particularly acute in murder trials. Jurors play a critical role in bringing legitimacy to punishments that take life or deprive liberty for life. However, murder trials can be lengthy and the evidence presented can be disturbing. For example, the multiple-victim murder trial of Robert “Willie” Pickton, who was suspected in the deaths of 26 women in British Columbia, Canada, lasted just over 9 months (Butler 2007). In order to address these issues, some courts provide psychological, psychiatric, or social work services to jurors following trial (Anand and Manweiller 443 2005; Chopra 2002).

Juries at the Sentencing Phase

Even if a jury decides the verdict, it is not necessarily involved in sentencing. For most types of crimes in most US jurisdictions, professional judges have the sole responsibility for sentencing criminal offenders. In six US states, jury sentencing is an option in felony trials and defendants may choose either judge or jury sentencing. However, in capital cases, most US states give the decision on whether or not the defendant should be sentenced to death to the jury. In Canada, juries do not participate in sentencing offenders. Murder convictions carry automatic life sentences, and for other convictions, judges determine the sentence bearing in mind sentencing ranges in the Criminal Code, the codified principles of sentencing, and previous similar cases. However, when a defendant is convicted of first or second-degree murder charges, the jury can make a nonbinding recommendation of how long the defendant should remain ineligible for parole. In South Korea, juries decide on a sentencing recommendation and submit it to the judges. Similar to Canadian parole recommendations, Korean jury recommendations on sentencing are not binding (Park 2010).

Judges and juries will experience the task of sentencing offenders differently in the United States. In many jurisdictions, judges consider statutory ranges, sentencing guidelines, and typical sentences in similar cases as they determine an individual defendant’s sentence. In contrast, states often limit the information jurors receive about the offense, the offender, and sentencing guidelines. In Virginia, juries but not judges must impose the statutory minimum sentence. Ironically, jury sentencing may reduce the use of juries at trial, as prosecutors use the prospect of unfettered jury sentencing to encourage defendants to enter a plea before trial (King and Noble 2004).

3. Lay Judges and Mixed Courts

In countries that follow the civil law tradition, lay judges (alternatively, lay assessors) sit in mixed courts and tribunals with professional legally trained judges. Lay judges serve jointly with professional judges in many European countries, including Germany, Austria, Denmark, France, Finland, Hungary, Italy, Norway, Poland, and Sweden, and in post-Soviet countries including the former Czechoslovakia and in countries of the former Yugoslavia (Hans 2008; Kutnjak Ivkovic´ 2007). Several new systems of lay participation use the mixed court model: for example, Japan’s mixed court of lay citizens and professional judges, Saiban-in Seido, and Argentina’s mixed court in Co´rdoba (Corey and Hans 2010).

Selection of Lay Judges

Similar to the way that jurors are selected, lay judges are ordinary citizens selected from a list of potential candidates who fulfill age, citizenship, literacy, or education requirements. For example, in Italy, lay judges must be Italian citizens of “good moral conduct,” between the ages of 30 and 65 years, with at least a high school diploma (Catellani and Milesi 2006). Citizens with specialized skills may be sought for certain cases, such as offenses involving juvenile offenders. In those cases, lay judges may be expected to have parenting experience or a degree in education, psychiatry, social work, or sociology (Kutnjak Ivkovic´ 2007; Catellani and Milesi 2006). Some countries explicitly prohibit selection from among occupations with legal education or experience, such as professional judges, prosecutors, attorneys, or police officers; whereas in South Korea, soldiers, police officers, and firefighters are exempted from serving as lay judges because of the essential nature of their jobs.

Typically, a presiding judge or a commission of the court reviews lists of randomly selected candidates. Candidates who meet the legal requirements are appointed or elected and will serve for a period of time (Malsch 2009). The process of selecting lay judges may be more or less democratic and transparent. Citizens may elect lay judges to serve and sit on trials intermittently throughout a period of several years (Kutnjak Ivkovic´ 2007). On the other hand, in some countries, important members of the community such as mayors or municipal commissioners appoint potential candidates (Kaplan et al. 2006). To address transparency concerns, the president of the court in Italy posts lists of prospective lay judges in public places for members of the public to review.

In reality, the selection process can be political and can preference certain segments of the population. In Norway, a nomination committee picks candidates from among registered political party members. Some procedures or qualifications will favor middle-class citizens, leading to a disproportionate number of middle-class lay judges. And in countries with a large immigrant population, citizenship requirements may create tribunals that do not represent the population.

Lay Judges at Trial

The numbers of lay and professional judges who sit at trial differs across the various jurisdictions and often corresponds to the severity of the case, with larger tribunals sitting for more serious cases. In Japan, six lay judges and three professional judges decide guilt and sentencing in serious felony cases (Fukurai 2011), whereas in Poland, only three panel members try less serious criminal cases. Other countries have different combinations of lay and professional judges depending on whether the crime is a lesser crime or a more serious felony offense. For example, in Germany, two lay assessors and one professional judge sit for most criminal cases, whereas two lay and three professional judges try the more serious crimes. In South Korea, five to nine lay judges sit in mixed courts, with nine lay judges participating in cases where the defendant could receive the death sentence or life imprisonment. And in Italy, six lay judges and two professional judges hear cases where the defendant could be incarcerated for at least 24 years or life or where the crime is against the state (Catellani and Milesi 2006), whereas a law graduate appointed as an honorary judge for a term of 4 years can decide misdemeanor criminal cases. As in some of the panels noted above, lay judges may outnumber professional judges.

In many mixed court systems, lay judges decide all of the factual and legal issues in conjunction with the professional judges. This is not the case, however, in Japan. There, only the professional judge has the authority to determine questions of law and procedure. It is typical for a professional judge to control the trial. For example, a presiding professional judge may determine the trial date and summons the defendant and witnesses. In certain courts, the presiding judge will examine the witness before other members are allowed to speak. Lay judges can usually take an active role in the trial if they are so inclined. They may examine the evidence and question the witnesses including the defendant, either directly or indirectly through the professional judge.

The mixed court trial will work best when lay judges actively participate. Research indicates that professional judges, the presiding judge in particular, have a role to play in facilitating active lay participation. Lay judges are more likely to ask questions and participate in deliberations when encouraged to do so by professional judges. Lay judges are also more likely to be active during the trial and deliberations when they have special expert or technical knowledge that relates to the issues at trial. These were the findings of observers of mixed courts in Croatia, who noted that while expert lay judges were active at trial, regular lay judges asked questions only infrequently (Kutnjak Ivkovic' 2007). This research also found that the legal professionals, the lawyers and judges, had more respect for the expert lay judges.

Access to the case file or dossier affects the extent to which lay judges are able to do the work of assessing the evidence at trial. Germany prohibits lay judges from reviewing the case dossier and in France, only the presiding judge has access to the dossier (Hans and Germain 2011). Studies of mixed courts in Poland found that even

though lay judges were allowed access to the dossier, most did not read the file. Access to the case dossier, laudable if one seeks equality of information between lay and professional judges, is nonetheless controversial in that it is prepared by the prosecution and often contains potentially biasing information such as a defendant's criminal record. Moving from a dossier-based trial to oral presentations, as was done in Japan, tends to equalize the information available to lay and professional judges.

Several jurisdictions have formal rules about the deliberation and decision-making processes to ensure full and fair contributions by citizen participants. In Japan, the judgment must be agreed upon by a majority of the panel, with at least one citizen and one professional in the majority. Norwegian lay judges must consent to the decision written by the professional judge (Malsch 2009). Other jurisdictions may provide for lay judges to vote on guilt or innocence before the professional judges give their verdicts. Research has shown, though, that even with formal requirements, lay judges often agree with professional judges, and rarely use their larger numbers to outvote them. A study in Sweden found that lay judges outvoted the professional judges in only 1–3% of all criminal cases. In cases where lay judges disagree with professional judges, it is the lay judges who are likely to modify their opinion to resolve the disagreement (Kutnjak Ivkovic' 2007).

Nevertheless, lay participants tend to be positive about their experiences, just as jurors usually are. More than 85% of Croatian lay judges had positive opinions about their participation. And in a study of Japanese citizen participation, 94% of the lay judge respondents reported having a positive experience. Lay judges believe they have a substantial and beneficial impact on verdicts. A study of German lay judges indicates that most respondents felt that the court would have decided differently "in a few cases" and only 20% responded that the court's decision would have been the same without the participation of lay judges.

Even though lay judges serve at the trial level, in most countries, appeals are decided by panels of professional judges only. Some exceptions include Sweden, which uses lay judges at the appellate level, but with a greater number of professional judges sitting on the panel, and France and Italy, which allow lay judges to serve in appeal courts. Lay judges can also sit on certain post-conviction reviews in Germany.

Sentencing Circles

Another way that laypersons participate in the criminal trial is through sentencing circles (Goldbach 2010). In Canada, sentencing circles modeled on Aboriginal healing circles are being used at the sentencing phase of a criminal trial for adult offenders and in juvenile diversion programs, as a way to encourage Aboriginal participation in the criminal justice system. Sentencing circles allow for a more restorative justice approach to sentencing, one that focuses on moral growth, constructive resolution of differences, and empowerment of individuals and the community to take responsibility for harm done.

The Canadian Department of Justice funds approximately 275 community-based justice committees which provide all levels of criminal justice support. In these communities, the justice committee works with the court to decide who will participate in sentencing circles and to identify a local community leader to act as keeper of the circle. In most cases, criminal justice participants, including the judge, the Crown prosecutor, defense counsel, the court reporter, the offender, the victim, and their respective families, form an inner circle. This inner circle can also include probation officers, court workers, youth workers, or police officers. Surrounding that circle is an outer circle of friends, relatives, and interested members of the community. Participants develop recommendations for sentencing and present those to the judge. The procedure can be lengthy and demands substantial commitment from victims, defendants, and the community.

Aboriginal communities participate in sentencing circles to construct sentences for such crimes as aggravated assault, assault causing bodily harm, robbery with violence, criminal harassment, breaking and entering, and arson. Judges are less likely to allow a request for a sentencing circle following conviction of murder or manslaughter. The use of sentencing circles is controversial, particularly in cases of domestic or sexual assault (Dickson-Gilmore and La Prairie 2005). However, this turn to community sentencing reflects a trend in Canada and in other jurisdictions encouraging greater victim and community involvement in all parts of the criminal justice process, as well as a move away from incarceration and retributive justice toward more restorative sentencing approaches. For example, in Canada, the form that the punishment takes following a sentencing circle may involve a conditional sentence, where the offender serves the sentence in the community and undertakes to fulfill certain conditions such as doing community service or enrolling in drug or alcohol treatment programs.

4. Controversies

Sentencing circles, mixed courts, and juries share similar problems and are confronted by overlapping critiques, which are in large part due to apprehension over lay persons participating in criminal trials. Concerns about lay competency to grasp complicated legal and factual issues are common to both jury and mixed trial systems. Similarly, both juries and lay judges face obstacles in accessing the full array of information that is available to professional judges. Lay judges in mixed courts confront the additional challenge of having to overcome professional judges' control of the hearing and deliberation processes. On the other hand, independent juries are under pressure to make decisions about guilt or innocence on their own, and both jurors and sentencing circle participants must determine punishment without the benefit of the germane experiences or expert knowledge that professional judges possess.

Research offers some reassurance. Studies indicate that lay participants are able to understand complex issues and often match judges in the accuracy of their decisions.

In addition, studies show that reforms of the trial system, such as allowing note taking, asking questions, mid-trial deliberations, and the use of notebooks to organize the evidence, can increase the quality of lay citizen fact finding. Other controversies, however, are less easily resolved. Even when procedures are enacted to ensure active participation, lay judges arguably play a minor role in mixed courts. And research confirms that juries are influenced by pretrial publicity about a case, by defendant characteristics such as criminal record, and by preexisting biases about particular types of crimes. It should be noted that professional judges are not immune to some of the same influences. However, judges are generally required to produce written reasons which are thought to protect against biased or arbitrary decisions. Following this line of thinking, in 2009, the European Court of Human Rights (ECtHR) overturned a jury conviction in Belgium, finding that the jury's failure to provide reasons violated the defendant's right to a fair trial under the European Convention of Human Rights (ECHR). To meet human rights requirements, jury verdicts must be justifiable in some fashion (Thaman 2011). Although the Grand Chamber of the European Court observed that the decision was not a general indictment of jury systems, merely an objection to the jury trial procedure in the specific case, it remains to be seen whether this will trigger a widespread call for juries to produce written reasons in Europe.

Two additional controversies that have not yet been discussed are worth reviewing. The first is the problem of wrongful or erroneous convictions that become apparent when exculpatory DNA or other evidence comes to light. Juries in particular are at risk of being portrayed as error-prone and overly eager to convict when it comes to attributing blame for the conviction of an innocent defendant (Vidmar and Hans 2007). Thaman (2011) suggests that requiring juries to give reasons for their decisions would protect against convicting innocent defendants. Yet research shows that the most frequent cause of wrongful conviction, found in roughly 75% of the cases, is mistaken eyewitness identification. A second important cause is false confessions. Thus, in the overwhelming majority of cases where a defendant is cleared by DNA evidence, the contributing factors relate to the evidence presented, not the jury's decision-making ability. Research through the Innocence Project in Toronto, Canada, illustrates systemic pressures at the trial and investigation stage, either because a particular case has a high profile or because of other institutional pressures (Martin 2002). This research suggests that a pressure to convict creates a bias in favor of building a case as opposed to solving the crime, which in turn shapes how police gather evidence and may even lead officials to disregard or suppress exculpatory evidence.

A second troubling controversy relates to capital punishment cases. Yet here too the problems are largely located in trial and court procedures as opposed to the fact of lay participation. In the early 1970s, the U.S. Supreme Court struck down all state death penalty statutes because of evidence of arbitrariness, inconsistency, and racial bias in capital punishment decisions. Unfortunately, at that time, juries were given little guidance

as to how to arrive at the decision to order a death sentence. Presently, state statutes require that juries consider or find certain aggravating circumstances before a death sentence can be ordered, reducing the impact of discretionary decision making.

Jury selection in death penalty cases, however, continues to be a problem for fair and equal decision making. Where the prosecution intends to seek the death penalty, only those jurors who are willing to impose a death sentence are considered to be fair and impartial. Yet research indicates that these individuals are more prone to convict. So-called “death-qualified” juries are more likely to believe the prosecution and have a general crime-control orientation which shapes their evaluation of the evidence. Analysis of capital case outcomes in the USA reveals that the sentence is related to the race of the victim, with black defendants who kill white victims more likely to be sentenced to death than other race of defendant-race of victim combinations. Nonetheless, the political, legal, and ethical justifications for including citizen input in a decision to sentence a defendant to death continue to be compelling. The US Supreme Court confirmed the importance of jury determinations in *Ring v Arizona* (2002). That decision held that in a capital jury trial, at a minimum, the jury and not the judge must decide the elements that make a case eligible for the death penalty, whether they are components of the criminal offense or additional aggravating factors.

6. Conclusion: Future Research

In the early decades of the twenty-first century, the role of citizen decision making in legal systems worldwide is at an interesting juncture. In many countries like the United Kingdom, the United States, and Canada, where juries have been a prime fact finder for centuries, the jury lives on as a potent symbol of democracy even as the number of jury trials declines. Jurors are largely positive about their experiences and studies indicate that participation on juries increases civic activity. Similarly, lay judges in mixed courts report being positive about their contributions, even though they tend to play secondary roles compared to the professional judges. Systematic research, from surveys of judges and juries in the United States in the 1950s to data collected on juries in South Korea between 2008 and 2010, supports the basic soundness of lay decision making in that it corresponds considerably to professional decision making. On the other hand, research also reveals that sources of bias continue to influence both lay and professional decision making in law.

More recent experiments with juries and mixed courts of professional and lay judges present new opportunities for democratic decision making in a host of countries. These new systems also offer potential for greater theoretical understanding and systematic scientific study. Research already underway in these countries will tell us much about what difference it makes to include laypersons in legal decision making. Because lay participation systems are introduced at particular points in time, researchers may be able to pinpoint their effects more precisely than has been possible in countries

with long-standing jury and mixed court systems.

Although there is now research on how jurors and lay judges react to their experiences, how the presence of lay citizens affects criminal defendants is largely unexplored. Advocates of sentencing circles propose the use of restorative justice approaches based on the assumption that the community's active participation in sentencing assists in rehabilitating the criminal defendant. This reasoned connection between democratic, accessible legal institutions and defendants' experiences is theoretically robust and suggests several research questions. Are defendants more willing to accept the verdict or punishment when recommendations or decisions are made by lay members of the community rather than by professional judges? Does the inclusion of lay perspectives increase or otherwise affect perceptions of procedural justice? These questions connect the conduct of trials with justifications for criminal punishment and therefore deserve further investigation.

Recommended Reading and References

- Anand S, Manweiller H (2005) Stress and the Canadian criminal trial jury: a critical review of the literature and the options for dealing with juror stress. *Crim Law Q* 50:403–440
- Butler D (2007) Trial by jury: the hours are long, the benefits are lousy and the work is highly stressful. *The Ottawa citizen* B1
- Catellani P, Milesi P (2006) Juries in Italy: legal and extra- legal norms in sentencing. In: Kaplan MF, Mart'ın AM (eds) *Understanding world jury systems through social psychological research*. Psychology Press, New York
- Chopra SR (2002) *Juror stress: sources, severity, and solutions*. Ph.D. dissertation, Simon Fraser University
- Corey Z, Hans VP (2010) Japan's new lay judge system: deliberative democracy in action? *Asian Pacific Law Policy J* 12:72–94
- Diamond SS (1993) What jurors think: expectations and reactions of citizens who serve as jurors. In: Litan RE (ed) *Verdict: assessing the civil jury system*. Brookings Institution, Washington, DC
- Dickson-Gilmore EJ, La Prairie C (2005) *Will the circle be unbroken? Aboriginal communities, restorative justice, and the challenges of conflict and change*. University of Toronto Press, Toronto
- Fukurai H (2011) Japan's quasi-jury and grand jury systems as deliberative agents of social change: decolonial strategies and deliberative participatory democracy. *Chicago Kent Law Rev* 86:789–829
- Gastil J, Deess EP, Weiser PJ, Simmons C (2010) *The jury and democracy: how jury deliberation promotes civic engagement and political participation*. Oxford University Press, Oxford
- Goldbach TS (2010) Sentencing circles, clashing world- views, and the case of Christopher Pauchay. *Illumine* 9(2):53–76

- Hans VP (2008) Jury systems around the world. *Annu Rev Law Soc* 4:275–297
- Hans VP, Germain CM (2011) The French jury at a crossroads. *Chicago Kent Law Rev* 86:737–768
- Kaplan MF, Mart'in AM, Hertel J (2006) Issues and prospects in European juries: an overview. In: Kaplan MF, Mart'in AM (eds) *Understanding world jury systems through social psychological research*. Psychology Press, New York
- Kim S, Park J, Park K, Eom J (2013) Judge-jury agreement in criminal cases: the first three years of the Korean jury system. *J Empir Leg Stud* 10:35–53
- King NJ, Noble RL (2004) Felony jury sentencing in practice: a three-state study. *Vanderbilt Law Rev* 57:885–964
- Kovalev N (2010) *Criminal justice reform in Russia, Ukraine, and the former republics of the Soviet Union*. Edwin Mellen Press, Lewiston
- Kutnjak Ivkovic' S (2007) Exploring lay participation in legal decision-making: lessons from mixed tribunals. *Cornell Int Law J* 40(2):429–454
- Lempert R (2007) The internationalization of lay legal decision-making: jury resurgence and jury research. *Cornell Int Law J* 40:477–488
- Malsch M (2009) *Democracy in the courts: lay participation in European criminal justice systems*. Ashgate, Farnham
- Marder NS (ed) (2011) *Symposium on comparative jury systems*. *Chicago-Kent Law Rev* 86(2):449–853
- Martin D (2002) Lessons about justice from the “laboratory” of wrongful convictions: tunnel vision, the construction of guilt and informer evidence. *UMKC Law Rev* 70:847–864
- National Center for State Courts (1998) *Through the eyes of the juror: a manual for addressing juror stress*. Willamsburg, NCSC Publication No. R-209
- National Center for State Courts Jury Topic Page, available at <http://www.ncsc.org/Topics/Jury.aspx>
- Park R (2010) The globalizing jury trial: lessons and insights from Korea. *Am J Comp Law* 58:525–582
- Tanovich DM, Paciocco DM, Skurka S (1997) *Jury selection in criminal trials: skills, science, and the law*. Irwin Law, Concord
- Thaman SC (2011) Should criminal juries give reasons for their verdicts?: The Spanish experience and the implications of the European court of human rights decision in *Taxquet v Belgium*. *Chicago Kent Law Rev* 86:613–668
- The Jury and Democracy Project website, available at <http://www.la1.psu.edu/cas/jurydem/>
- Tocqueville AD (1945) *Democracy in America* (trans: Phillips B, Reeve H, Bowen, F). A. A. Knopf, New York. French edition: Tocqueville AD (1835) *De la de'mocratie en Ame'rique*. C. Gosselin, Paris
- Vidmar N (2000) *World jury systems*. Oxford University Press, Oxford
- Vidmar N, Hans VP (2007) *American juries: the verdict*. Prometheus, Amherst